

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2806-CR

Cir. Ct. No. 2007CF699

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. TRIOLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Christopher Triolo appeals a judgment of conviction for first-degree sexual assault of a child and repeated first-degree sexual assault of a child, and an order denying his postconviction motion. Triolo

argues he received ineffective assistance of counsel. Alternatively, he seeks a new trial in the interest of justice. Triolo further requests that we require the State on remand to shorten the time period with regard to occurrence of the repeated sexual assault charge. We reverse and remand.

BACKGROUND

¶2 The State charged Triolo with two counts: first-degree sexual assault of a child, D.K., occurring on or about June 1, 2007; and repeated first-degree sexual assault of D.K., occurring between November 15, 2003 and April 30, 2007. At the time of trial in March 2011, D.K. was sixteen years old.

¶3 D.K. testified at trial. Triolo was her mother's boyfriend during the time of the alleged assaults. The State later called Sara Schumacher, a forensic interviewer. Schumacher interviewed D.K. when she was twelve, after D.K. had reported the sexual assault allegations in June 2007. The interview was video-recorded, and the State, without objection, played the entire interview for the jury.

¶4 During the interview, D.K. told Schumacher she decided to report the sexual assaults after a friend, R., told D.K. that Triolo had sexually assaulted R.¹ D.K. also discussed additional instances of sexual assault during the interview that she had not testified to at trial. She was not called to testify after the video was played.

¶5 Triolo testified that D.K. was lying and that he never had any type of sexual contact with her. The jury found Triolo guilty of both counts.

¹ The interview transcript and the parties identify the friend only as "R."

¶6 Triolo moved for postconviction relief, requesting a new trial due to ineffective assistance of counsel. Triolo argued three grounds for ineffective assistance: (1) counsel should have objected to the State playing the DVD to the jury; (2) counsel's closing argument misstated the content of the DVD; and (3) counsel should have renewed an objection that the charging period was too vague on count two, repeated sexual assault. Alternatively, Triolo sought a new trial in the interest of justice, asserting the real controversy was not fully tried.

¶7 Prior to the postconviction hearing, Triolo's current attorney had the DVD interview transcribed. The transcript was received without objection. At the hearing, Triolo's trial counsel testified as to why he did not object to playing the DVD:

I thought that when [D.K.] testified, that being the victim, she was vague and, also, in my opinion, gave contrary statements to what was contained within the video. Also, the video was taken shortly after [D.K.] disclosed, and trial was ... some three and a half/four years after [E]ssentially it was going to be more of a trial strategy to argue about the inconsistencies between what she initially disclosed and what she disclosed on the stand.

Trial counsel also testified he had watched the DVD about five times before trial and never caught D.K.'s statement that R. told her Triolo had assaulted R., as opposed to the fact that R. had simply reported, generally, that she had been assaulted. Additionally, trial counsel conceded he misstated facts in his closing argument when attempting to demonstrate inconsistencies between the interview and D.K.'s testimony.

¶8 The court denied Triolo's postconviction motion in an oral ruling, explaining:

Based on the record and the transcript and the Court's review of the DVD, I would assume, and I think I have to

assume that one of the jurors, if not all the jurors, actually heard the comment [that Triolo had assaulted R.] and then do my analysis from there, was that error on behalf of Mr. Triolo's trial counsel—I think it would be fair to say it was error on behalf of the State, the Court and [trial counsel]—and I would just say as far as [trial counsel's] overall conduct and representation of Mr. Triolo, I think overall I would not find that it was deficient.

....

So I don't believe that [trial counsel's] overall conduct and performance could be declared as ineffective[.]

The court also reasoned that D.K.'s mention of Triolo assaulting R.

would not have changed the result of the trial. So I can't find, in viewing the record in totality, that Mr. Triolo was denied a fair trial [S]o I can't find that that momentary statement on the DVD of the victim indicating her friend had been assaulted by Mr. Triolo would have caused a different finding by the jury

The court determined that the comments about what R. said were inadmissible hearsay, but it held that the DVD interview was not hearsay, because it was consistent with D.K.'s testimony and reporting, and D.K.'s credibility was at issue in the trial.

¶9 Regarding trial counsel's misstatements in closing, the court observed, "I don't think it's disputed that there were some misstatements of fact in that closing argument[.]" Nonetheless, the court explained, "I certainly wouldn't say that that rose to the level of him being ineffective in his representation" The court also rejected Triolo's argument that the real controversy was not fully tried, reasoning that "the jury was presented with the entire facts of the case" and that "the facts were given to the jury and the jury made their decision." Triolo now appeals.

DISCUSSION

Ineffective assistance of counsel

¶10 Triolo contends his trial counsel provided ineffective assistance. To prevail on this claim, he must prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). An attorney's performance is deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In determining whether counsel's deficient performance was prejudicial, a court should consider the cumulative effect of the deficiencies. *State v. Thiel*, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305.

¶11 Triolo argues his trial counsel was ineffective for not objecting to the State playing the DVD interview of D.K., which he contends was hearsay,² and for misstating the contents of that interview during closing argument when attempting to undermine D.K.'s credibility. Triolo argues playing the entire interview served

² WISCONSIN STAT. § 908.08 creates an exception to the hearsay rule that permits introduction of an audiovisual recording of a child's statements in certain circumstances. Under that statute, the party seeking to introduce the recording must move for its admission prior to trial, and if the child is called as a witness, the child must testify immediately after the recording is played. *See* WIS. STAT. § 908.08(2), (5). Triolo and the State agree, however, that the § 908.08 hearsay exception is inapplicable because D.K. was sixteen years old at the time of trial.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to bolster D.K.'s trial testimony, and contends the statement concerning his alleged sexual assault of R. was extremely prejudicial.

¶12 The State responds that Triolo forfeited his arguments with regard to the DVD interview because his trial counsel failed to object. This is a peculiar argument. Triolo argues his attorney was ineffective precisely because of the failure to object. The ineffective assistance claim, raised in Triolo's postconviction motion, is properly before us.

¶13 The State further argues the DVD interview was not hearsay because it was consistent with D.K.'s testimony and served to bolster her credibility. This argument fails. The State cites WIS. STAT. § 908.01(4)(a)2., which provides that a prior statement is not hearsay if it is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]" The State does not, however, assert—much less develop an argument—that the recording could have been properly introduced to rebut a claim of recent fabrication or improper influence or motive. We may disregard undeveloped arguments. *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Further, Triolo argued in his brief that there was no allegation of recent fabrication or improper motive. Failure to refute that argument is deemed a concession. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶14 Additionally, the State cites no authority supporting its assertion that prior consistent statements are not hearsay merely because they are introduced for

the purpose of bolstering a witness's testimony.³ The State appears to argue that such a statement is not introduced to prove the truth of the matter asserted. However, a prior consistent statement cannot bolster one's testimony, i.e., support the testimony's truthfulness, without being introduced for the statement's own truthfulness. Stated otherwise, if a jury cannot consider a prior statement for its truthfulness, the statement does nothing to bolster subsequent consistent testimony.

¶15 Regardless whether the DVD interview was inadmissible hearsay, the State argues counsel was not deficient in failing to object. Trial counsel testified it was an intentional trial strategy not to object to the DVD. Counsel believed that the video would show inconsistencies in D.K.'s version of the facts and that D.K.'s demeanor in the interview suggested she was being untruthful.

¶16 We reject the argument that failing to object to the State playing the DVD could be viewed as a reasonable trial strategy. As trial counsel conceded, he could have instead utilized police reports to bring out inconsistencies. Alternatively, he might have had the interview transcribed and impeached D.K. with only limited portions of the transcript as necessary. Any value in showing D.K.'s demeanor was far outweighed by the prejudicial effect of the DVD.⁴ The video of D.K. giving consistent statements four years earlier served to bolster her

³ The State does provide a "see" citation to one case, but does not explain how that case is relevant. The cited case did not address any issue concerning prior consistent statements or bolstering testimony.

⁴ In closing argument, trial counsel argued D.K.'s demeanor in the interview suggested she was untruthful because she "wasn't crying, she wasn't upset, she wasn't frustrated" and when the interviewer left the room and returned, D.K. "avoided eye contact, was laying on her stomach, fidgeting with her shoes." Counsel could have sought to introduce this evidence by cross-examining Schumacher, the interviewer.

credibility at trial. Indeed, counsel's claimed inconsistencies were merely that D.K.'s statements in the DVD were "way more detailed than the direct and cross-examination" of D.K. and contained additional allegations of sexual assault that were not brought out in her live testimony. Further, because D.K. testified prior to the DVD being played, trial counsel never had an opportunity to cross-examine D.K. concerning her prior statements. This in itself undermined counsel's supposed trial strategy. Regarding D.K.'s statement about R. also being assaulted by Triolo, trial counsel testified he simply missed the statement when he reviewed the DVD prior to trial. Thus, there was no alleged strategy in permitting the jury to hear that statement. For the foregoing reasons, trial counsel performed deficiently by failing to object to introduction of the DVD interview.

¶17 Trial counsel's performance was further deficient when attempting to undermine D.K.'s credibility during closing argument. Counsel argued:

She testified yesterday, and I think it was when I was questioning her about the shorts, and she indicated the shorts were [j]ean shorts, where the video she indicated the shorts were silky. Now, it's not that great, I mean, color is color, give a little bit on that; the difference between jean shorts and silky shorts is significant. [D.K.] never explained what type of underwear [Triolo] would wear, color of pubic hair, any identifying features or anything that would lead us to believe that that's true and that we'd be able to believe [D.K.]

However, in the DVD interview, D.K. had described Triolo's pubic hair as "black," and explained that he did not have any noticeable tattoos, moles or scars. Counsel also misstated the evidence regarding the shorts, confusing two different incidents. Trial counsel acknowledged his misstatements at the postconviction hearing and, as the State acknowledged, it "did pounce on" those misstatements during rebuttal argument, explaining to the jury how Triolo's attorney was wrong.

¶18 The State offers little in way of a prejudice argument. Primarily, it recites the trial court’s reasoning that there was only a single reference to Triolo sexually assaulting R., the statement “would not have changed the result of trial,” the case came down to witness credibility, and trial counsel’s “overall conduct and performance” was not ineffective. The State further argues “[a]lthough the State admittedly discussed the [DVD] during its closing, the State disagrees that it relied on the [DVD] to obtain the convictions.”

¶19 The State misapplies the ineffective assistance standard. We do not consider whether trial counsel’s overall performance was ineffective. Counsel may do an otherwise stellar job and still be deemed ineffective based on a single, prejudicial error. Nor do we apply an outcome determinative prejudice standard and determine whether given errors would have changed the result of trial; the question is whether there is a reasonable probability of a different outcome. *See Strickland*, 466 U.S. at 694.

¶20 Counsel’s errors here undermine our confidence in the trial’s outcome. As the trial court recognized, this was a he-said, she-said case that turned on witness credibility. The failure to object to the hearsay DVD interview bolstered the credibility of D.K.’s trial testimony with prior statements that were not only consistent, but more detailed and which included additional allegations of assault against D.K. Moreover, the video needlessly presented the jury with a highly prejudicial allegation of sexual assault of a second victim. It was unnecessary to introduce the entire interview to present inconsistencies in D.K.’s statements and, regardless, counsel then failed to properly identify inconsistencies or cross-examine D.K. concerning the interview. Rather, in attempting to undermine D.K.’s testimony in closing argument, Triolo’s attorney mistakenly directed the jury to facts that suggested she was credible. The collective effect of

counsel's errors deprived Triolo of "a fair trial, a trial whose result is reliable." *See id.* at 687.

¶21 Because we hold Triolo is entitled to a new trial due to ineffective assistance of counsel, we need not address his alternative argument that he should receive a new trial in the interest of justice. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

Definiteness of charging period

¶22 The criminal complaint charged Triolo with repeated sexual assault of D.K. occurring between November 15, 2003 and April 30, 2007. This charge alleged seven acts of assault. Prior to trial, Triolo unsuccessfully challenged the charging period as impermissibly vague. However, at the hearing on his motion, the State conceded it could shorten the span to "somewhere between 12 and 24 months, and I think it would be able to be drawn to about 12" The State did not subsequently amend the charging period.

¶23 A defendant has due process and Sixth Amendment rights to fair notice of the charges against him or her in order to have a fair opportunity to defend against those charges. *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). In *Fawcett*, we set forth seven factors to aid in the determination of whether a charging period is reasonably specific, including "the length of the alleged period of time in relation to the number of individual criminal acts alleged" and "the ability of the victim ... to particularize the date ... of the alleged transaction or offense." *Id.* at 253. Additionally, in *State v. Stark*, 162 Wis. 2d 537, 545-48, 470 N.W.2d 317 (Ct. App. 1991), a child sexual assault case, we held the State violated a defendant's constitutional right to notice when it

failed to reasonably limit a charging period consistent with facts that allowed the State to do so.

¶24 Because we reverse on other grounds, we need not resolve the charging issue Triolo raises. *See Castillo*, 213 Wis. 2d at 492. We trust that on remand the State will review its charging decision in light of the applicable law and exercise its discretion accordingly.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

